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## REASONED OPINION

**delivered to Norway in accordance with Article 31 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice due to a breach by that State of Articles 31 and 36 of the EEA Agreement**

### I. Introduction

On 17 June 2003, the Norwegian Parliament adopted amendments to the gaming and lottery legislation which provided for the establishment of a monopoly for Norsk Tipping AS for the operation of gaming machines. On 29 August 2003, these legislative amendments were sanctioned by the Norwegian Government (*lov 2003-08-29 om endringer i pengespill- og lotterilovgivningen*). The decisive provision, according to which only Norsk Tipping will be permitted to operate gaming machines, will enter into force on 1 January 2006. However, most of the licenses to the current operators will run out already by the end of 2004. Norsk Tipping has already started to enter the market; a process that will accelerate in the course of 2005.

The Authority has received five complaints against the Government of Norway with regard to the prospective monopoly of Norsk Tipping. Moreover, the same matter is subject to national legal proceedings in the Oslo city court.

Following two letters (17 July 2003 and 6 January 2004) requesting information and replies from the Norwegian Government (1 September 2003 and 16 February 2004), the Authority sent the Government a letter of formal notice dated 23 April 2004. In the letter, the Authority questioned whether financial interests had motivated the chosen model with Norsk Tipping as a sole operator of approximately 10.000 gaming machines. Furthermore, the Authority pointed to what appeared to be several inconsistencies in the Norwegian gaming policy, in particular in the marketing and product policy pursued by Norsk Tipping. Finally, the Authority suggested that the aims of preventing gaming addiction and crime could be fulfilled by less restrictive measures. The Authority concluded that the amendments to the Norwegian lottery legislation, introducing a monopoly with regard to the operation of gaming machines, constituted a restriction to the free provision of services in Article 36 EEA and the freedom of establishment in Article 31 EEA, which did not seem to have an apparent justification.

By letter dated 28 June 2004, the Norwegian Government gave an extensive reply to the letter of formal notice. According to the Government, gambling behaviour surveys show that it is first and foremost the gaming machines which cause social problems. It was the undesirable development of the gaming machine market rather than financial

considerations that was the main reason why the Government found it necessary to impose a total ban on gaming machines in their present form and instead to introduce a new system with fewer and less aggressive machines. The Government's gaming policy is not inconsistent as it is based on a distinction between "low risk" and "high risk" games. In light of the case-law of the Court of Justice, the Norwegian Government finds that the decision to give Norsk Tipping exclusive rights is included among the policy instruments that may be used to prevent socially harmful consequences which can result from money games. According to the Government, alternative models for the organization of the market would not give the authorities the required possibilities of direct control and supervision and the possibility to change swiftly the functionality of the gaming machines in light of new scientific evidence. Consequently, the Government cannot see that the decision to introduce a monopoly is contrary to Norway's commitments under the EEA Agreement.

Additionally, the Norwegian Government responded to letters from two of the complainants by a memo dated 22 September 2004.

## II. Relevant EEA law

Article 31 of the EEA Agreement states that, within the framework of the Agreement, there shall be no restrictions on the freedom of establishment of nationals of an EU Member State or an EFTA State in the territory of any other of these States.

Article 36 of the EEA Agreement states that, within the framework of the Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of the Contracting Parties.

As pointed out in the letter of formal notice, it is the settled case law of the EFTA Court and the Court of Justice that national measures liable to hinder or make less attractive the exercise of the fundamental freedoms must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain this objective.<sup>1</sup>

The Court of Justice has on numerous occasions ruled on gaming and gambling legislation, most notably in the cases *Schindler*, *Läärä*, *Zenatti*, *Anomar* and *Gambelli*.<sup>2</sup>

It follows from the mentioned case law that operation of gaming machines constitutes provision of services. Legislation, which prohibits any person other than a licensed public body from running the operation of the machines in question, constitutes an impediment to the freedom to provide services in that it directly or indirectly prevents operators in other Member States from making slot machines available to the public with a view to their use in return for payment.<sup>3</sup> A legislation, which makes it impossible in practice for companies of other Member States to obtain licences for the provision of gambling services, is a

<sup>1</sup> Case C-19/92 *Kraus v Land Baden-Württemberg* [1993] ECR I-1663, at paragraph 32, and Case C-55/94 *Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, at paragraph 37.

<sup>2</sup> Case C-275/92 *Schindler* [1994] ECR I-1039, Case C-124/97 *Läärä and Others* [1999] ECR I-6067, Case C-67/98 *Zenatti* [1999] ECR I-7289, Case C-6/01 *Anomar and Others* [2003] ECR I-8621, Case C-243/01 *Piorgiorgio Gambelli and Others*, not yet reported.

<sup>3</sup> Case C-127/97 *Läärä*, mentioned above, at paragraph 29.

restriction, not only to the free provision of services, but also to the freedom of establishment.<sup>4</sup> The free provision of services includes also the freedom to receive and benefit from the services offered.<sup>5</sup>

It is also established case law that restrictions to fundamental freedoms can be justified, given that certain criteria are fulfilled. In the context of gaming and gambling, it has been acknowledged that states have a certain margin of appreciation in determining the extent of the protection to be afforded on their territory.<sup>6</sup> A restriction is, however, only permitted if it serves to limit betting activities in a consistent and systematic manner. Furthermore, the measure must reflect a concern to bring about a genuine diminution of gambling opportunities. The financing of social activities may only constitute an incidental beneficial consequence of the restrictive policy adopted. Finally, the State in question has to show that the restriction is non-discriminatory, justified by imperative requirements in the general interest, suitable for achieving the objective which it pursues and does not go beyond what is necessary in order to attain it.<sup>7</sup>

The above mentioned margin of discretion in setting the level of protection does not mean that there should only be a cursory judicial control of objectives behind the national legislation.<sup>8</sup> Nor does it imply that the supervisory organs should be reticent in their assessment as to whether the measure in question was only motivated by legitimate concerns. In the event illegitimate aims at least partially motivated the legislation, the measure must either be set aside or, at the very least, imply that the supervisory bodies should not show accord the State the discretion it would otherwise have had.

### III. The Authority's assessment

#### III.1 General Introduction

The Authority does not dispute that the objectives to reduce gambling addiction, prevent underage gambling and combat crime are laudable aims which may, potentially, justify a restriction to a fundamental freedom. Neither is the Authority calling into question the competence of the Norwegian Government to regulate the market for slot machines in order to achieve those aims, by for instance requiring a reduction of the number of gaming machines, or by adopting stricter regulations concerning the machines and their location.<sup>9</sup>

However, the Authority is of the opinion that the introduction of the monopoly is contrary to the EEA Agreement for several reasons. First, it appears as if financial considerations lay behind the chosen model with Norsk Tipping as a sole operator of approximately 10.000 gaming machines, see point III.2 below. Second, the Authority considers the Norwegian Government's gaming policy to be inconsistent within the meaning of the case law of the Court of Justice, see point III.3 below. Third, the Authority fails to see that the introduction of exclusive rights for Norsk Tipping to operate gaming machines is necessary in order to prevent gaming addiction and crime, see below under point III.4.

<sup>4</sup> Case C-243/01 *Gambelli*, mentioned above, at paragraph 48.

<sup>5</sup> Case C-243/01 *Gambelli*, mentioned above, at paragraphs 55 et seq.

<sup>6</sup> See, to that effect, below in point III.4.a).

<sup>7</sup> Case C-243/01 *Gambelli*, mentioned above, at paragraphs 62, 65 and 67 as well as Case C-67/98 *Zenatti*, mentioned above, at paragraph 36 and see further with the regard to the proportionality test below in point III.4.a).

<sup>8</sup> Case C-67/98 *Zenatti*, mentioned above, at paragraph 37.

<sup>9</sup> See below in point III.4.b).

### III.2 Financial considerations

It follows from the jurisprudence of the Court of Justice cited above that the financing of social activities through the proceeds of authorised gaming must constitute only an incidental beneficial consequence and not the real justification for a restrictive policy on gaming.<sup>10</sup> Even though lotteries and other types of gambling may contribute significantly to the financing of benevolent or public-interest activities, that motive is ultimately economic and cannot therefore itself be regarded as an objective justification for restrictions on the freedom to provide services.

The Authority does not doubt that the Government's intention with its first proposal for changes in the gaming legislation in June 2002 was genuinely aimed at combating gambling addiction. Nor does the Authority question that the reduction of the number of gaming machines down to approximately 10.000 as presented in the Government's second proposal from October 2002 in itself was expression of the same will. The Authority assumes that such a number of machines represent what the Government considers to be an acceptable level of such gaming services.

However, with respect to the operation and ownership of the machines, the Authority described in the letter of formal notice several factors that indicated that securing at least the 2001 level of revenue to charity was an important objective when the actual model with Norsk Tipping as a sole operator was chosen. Such a level of revenue would not have been possible to achieve with a licence system with private operators within the defined frame of 10.000 machines operated and placed in accordance with the new regulations.

In this respect, the Authority, *inter alia*, pointed to the fact that only four months before the model with Norsk Tipping as a sole operator was presented, the Norwegian Government, in June 2002, proposed amendments to the gaming legislation without any market involvement from Norsk Tipping. The proposal was based on continuation of the licence system with private operators, but with stricter provisions on location of gaming machines. Machines would only be allowed in areas with access control, as such a measure was considered important in order to enforce the 18-year age limit. The proposal was met with opposition not only by the private machine operators but also by the receiving charities due to fears of expected reductions in potential earnings.<sup>11</sup> They estimated a reduction in turnover of about 75% and a reduction in proceeds for charity of between 80 and 90 %. Shortly after, in October 2002, the Government withdrew the proposal and presented the new monopoly model.

In its reply to the letter of formal notice the Norwegian Government denies that financial considerations had any significant influence on the decision to withdraw the June 2002 proposal. It concedes that no new scientific studies concerning gambling addiction and crime related to gaming machines were published or made known to the Government between June and October 2002. The Norwegian Government, however, states that two, interlinked, reasons made it drop the June 2002 proposal.

First, the proposal was dropped because the Government during the first half of 2002, and thereby before submitting the June proposal for a public hearing, was made aware of "*extensive problems in relation to enforcement of the existing regulations. These included problems concerning compliance with and enforcement of the technical requirements applying to the functionality of the machines.*" The Government further explains that this

<sup>10</sup> Case C-67/98 *Zenatti*, mentioned above, paragraph 36, and Case C-243/01 *Gambelli*, mentioned above, paragraph 62.

<sup>11</sup> Reference is made to the Norwegian Government's letter of 24 February 2003 to the Authority.

information led the Government, in spring 2002, to ask Norsk Tipping to assess the consequences of taking over the operation of gaming machines “*if it did not prove possible to establish a dialogue with existing market operators on moderation and accountability in the money gaming services on offer*”.<sup>12</sup>

Second, an additional reason for dropping the June proposal was that the responses of the market operators to the bill were negative. In this respect, the Government refers to reactions from NOAF and Norsk Lotteridrift. On that basis the Government concluded it would be difficult to gain acceptance for the bill from the market operators and that further measures to regulate the existing market in all probability would fail. It is also the Government’s impression that the existing operators “*have been having problems acknowledging the social consequences of their operations ever since the new Lottery Act came into force in 1995*”.<sup>13</sup>

The Authority must express its surprise about both these explanations. The first explanation effectively means that the Government should have been aware of “extensive problems” concerning compliance with the technical requirements pertaining to the functionality of the machines when it drafted its 2002 proposal. Yet, the Government decided not to address these problems in that proposal. Indeed, in the June proposal, the Government suggested a continuation of the system with private operators without enacting measures that would strengthen the enforcement of the regulations. Moreover, the explanation contradicts what has been said earlier by the Government most notably in its letter to the Authority of 1 September 2003, where the Government “*acknowledges the fact that the Gaming Board’s control and inspections of the machines have found few breaches with regard to machine functionality after type approval*.”<sup>14</sup>

With the second explanation, about the operators’ response to the June proposal, the Government basically indicates that it put forward a proposal that it itself doubted was appropriate and that it intended to present to Parliament only if the involved parties would fully support it. It is unclear to the Authority why amendments to combat the social problems related to gambling would require acceptance from the market operators, including NOAF and Norsk Lotteridrift ASA. Neither the Government nor the Storting need any agreement from private operators before new rules are introduced. Indeed, the fact that the Government introduced a monopoly for Norsk Tipping, and thereby took away the basis for continued operation of these entities, demonstrates that the economic interests of the private machine owners did not stand in the way for legislation aimed at preventing gambling addiction.<sup>15</sup> Moreover, the introduction of a monopoly can hardly be justified by the fact that private operators who will be affected by a new legislation – as part of a hearing initiated by the Government itself – argue against the enactment of rules that will reduce their potential income.

For these reasons, it seems more likely to the Authority that the mass opposition against the bill from the charitable organisations (due to the significant income reduction the new

<sup>12</sup> Reply to the letter of formal notice page 32.

<sup>13</sup> Reply to the letter of formal notice page 33.

<sup>14</sup> In the letter of 1 September 2003, the Government also referred to the manufacturers’ apparent strive to find loopholes in the regulations. However, as shown below in point III.4.c), a concern that the Government’s own rules contain a lacuna should not be met by introducing a monopoly, but by changing the rules so that the loophole ceases to exist.

<sup>15</sup> As regards the relevance of the attitude of market operators see further section III.4.c) and d) below.

model would entail)<sup>16</sup> was the primary motivating factor behind the withdrawal of the June 2002 proposal.

Also the new model, which was presented shortly thereafter, in which Norsk Tipping was to be granted a monopoly to operate approximately 10.000 gaming machines, appears to be motivated by financial considerations. In this new model, the Government had dropped the originally proposed changes concerning access control (which entailed that gaming machines no longer could be placed in kiosks and petrol stations). This change came after Norsk Tipping's letter to the Ministry of 19 September 2002. In that letter Norsk Tipping stated that the so-called "Stjernekiost" concept – in which the company should be allowed to place between 2000 and 2500 machines in kiosks and service stations – was a *precondition* for Norsk Tipping to be willing to operate gaming machines. Following this, the Ministry for Cultural and Church Affairs, in its second proposal of 25 October 2002, stated that the originally envisaged placing-restrictions could not be enacted without a significant reduction of the surplus to the social and humanitarian organisations. In comparison, a monopoly solution would – provided that it would still be possible to place machines in, *inter alia*, kiosks and services stations – secure the same level of revenue to charity as before, even if the number of machines would be reduced by 40%.<sup>17</sup>

As regards the number of machines, the Norwegian Government has at no time during the administrative proceedings so far presented any specific reasons for the chosen number of 10.000 machines. The background for that number appears to be Norsk Tipping's initial proposal of 1 July 2002, in which it was stated that the number of machines in a model with Norsk Tipping as a sole operator could be reduced by 40%, down to 10.000 machines, without any reduction of the revenues.<sup>18</sup> It was also stated that the main reason for giving Norsk Tipping a monopoly would be that such a model would secure maximum revenue to charity with a lower number of machines.

As mentioned in the letter of formal notice the Authority has noted a certain change in the Government's argumentation during the course of the process. In the consultation document of 25 October 2002 the economic aim of securing revenue for charity was seen as highly important, but later that aim was toned down to be only "*a positive side effect*" of the proposal. In the meantime the affected operators had replied to the consultation document and pointed to the fact that under EEA law the financing of social activities may constitute only an incidental beneficial consequence and not the real justification for the restrictive policy.<sup>19</sup>

Finally, the Government refers to the substantial increase in turnover on the machines from NOK 8.5 billion in 2001 to NOK 22 billion in 2003 and argues that a continuation of the current system would have resulted in substantial financial gains for the charitable organisations. Thus, the Government fails to see how Norsk Tipping's involvement in the process could imply that the financial interests are not subordinate to the social policy concerns at issue.<sup>20</sup> In answer to that the Authority recalls that Norsk Tipping presented its

<sup>16</sup> See *inter alia* Ot.prp. nr. 44 (2002-2003) page 2-3 and the Government's consultation paper of 25 October 2002, mentioned below, as well as the Government's letter to the Authority dated 24 February 2003.

<sup>17</sup> Ot.prp nr. 44 (2002-2003) page 27.

<sup>18</sup> Point 2.1 of the letter.

<sup>19</sup> See Ot.prp.nr 44 (2002-2003), point 4.5.3. In contrast, the revenue for charities was for the majority of the Parliamentary Committee in the Storting a major argument behind the introduction of the monopoly model. Reference is made to Innst O nr. 124 – 2002-2003, point 2.4.1. See also the article of the Minister for Culture and Church Affairs in "Dagbladet" 6 November 2002.

<sup>20</sup> Reply to the letter of formal notice, page 34.

proposal on the monopoly to the Government on 1 July 2002.<sup>21</sup> At that time, and when the Government put forward its October proposal, the extent of the turnover increase for 2002 and 2003 was not known.<sup>22</sup>

In conclusion, the Authority does not question the Norwegian Government's objective of reducing gaming addiction and that reducing the number of machines is a measure taken thereto. However, it remains the view of the Authority that the monopoly model for Norsk Tipping was motivated by the financial consideration of securing at least the 2001 level of revenue to charity. Such a level of revenue appeared in October 2002 not possible to achieve with a licence system with private operators within the defined frame of 10.000 machines operated and placed in accordance with the new regulations.

### III.3 The consistency of the Norwegian gaming policy

#### *a) Introduction*

As underlined above under point II, it follows from the case law of the Court of Justice that restriction on gaming services must reflect a concern to bring about a genuine diminution of gambling opportunities. Further, the restrictions based on such grounds and on the need to preserve public order must also be suitable for achieving those objectives, inasmuch as they must serve to limit betting activities in a consistent and systematic manner.<sup>23</sup> In so far as the authorities of an EEA State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.<sup>24</sup>

As stated in the Authority's letter of formal notice, when assessing the consistency of the Norwegian gaming policy the Authority takes as a starting point that Norsk Tipping is a company wholly owned by the Norwegian State. Moreover, Norsk Tipping is repeatedly referred to by the Ministry of Culture and Church Affairs as "*a policy instrument for regulating and controlling gaming activities*".<sup>25</sup>

In the reply to the letter of formal notice the Norwegian Government argues that Norsk Tipping cannot be identified with the Norwegian State and states that Norsk Tipping retains its autonomy in the sense that it takes independent decisions and measures within regulations and guidelines in force at any given time.<sup>26</sup>

In the Government's earlier statements, for instance in the letter of 1 September 2003, the importance of Norsk Tipping as a policy instrument for regulating and controlling gaming activities was underlined. It was explained that Norsk Tipping is under direct political

<sup>21</sup> Letter from Norsk Tipping to the Ministry of Church and Cultural Affairs dated 1 July 2002.

<sup>22</sup> Despite the knowledge the Government now possesses about the turnover increase, no additional adjustments to the new model have been made, for instance an additional reduction of the number of machines. The Authority therefore assumes that new system will generate income to charity that exceeds the 2001 level.

<sup>23</sup> Case C-67/98 *Zenatti*, mentioned above, paragraph 36, and Case C-243/01 *Gambelli*, mentioned above, paragraph 67.

<sup>24</sup> Case C-243/01 *Gambelli*, mentioned above, paragraph 69.

<sup>25</sup> See the Norwegian Government's letter of 1 September 2003, page 3 and of 16 February 2004, page 5, where it is stated that "*Norsk Tipping is the key strategic instrument in the implementation of Norway's gaming policy*".

<sup>26</sup> Reply to the letter of formal notice, page 52.

control with regard to both the drawing up of regulations and through the Ministry's capacity as owner and annual general assembly. The Authority acknowledges that Norsk Tipping is a separate legal entity and, as already mentioned in the letter of formal notice, that the Government cannot be bound by any statements made by Norsk Tipping. Nevertheless the Authority continues to find it correct to identify Norsk Tipping with the owner, the Norwegian State, in the sense that Norsk Tipping's approach, actions and general behaviour in the market is assumed to express and fully comply with the Norwegian Government's gaming policy.

In the letter of formal notice the Authority stated that the Norwegian authorities' approach to gambling addiction seemed inconsistent in, notably, three respects. First, consumers have via increased marketing been encouraged to engage in a broad range of gaming activities. Second, new games are being developed without there being presented tangible evidence that these games are not addictive. Finally, the explicit aim of the new monopoly holder is to increase the number of gaming machine players. In its response to the letter of formal notice the Norwegian Government disputes that any of these circumstances reflect an inconsistent gaming policy.

*b) Marketing of gaming activities*

As stated in the Authority's letter of formal notice, Norsk Tipping has in recent years been among the largest advertisers in Norway. In the last years – including the months following the adoption of the contested law – Norsk Tipping apparently spent increasing amounts on advertising. The marketing expenditure of Norsk Tipping has continued to be on the rise. Thus, the company spent NOK 84 million during the first six months of 2004 as compared to NOK 76 million for the same period in 2003, which amounts to an increase of 10,5%.

The Norwegian Government has earlier argued that “*an increase in Norsk Tipping's marketing budget will not necessarily mean an increase in the turnover and profit*”.<sup>27</sup> However, as the Authority stated in its letter of formal notice, whether or not the marketing activities of Norsk Tipping will actually have a higher or lower degree of success is not conclusive for the consistency of the approach taken by Norway as long as the *intended* effect of the marketing activities is to have consumers participating in gaming activities.

As noted in the letter of formal notice, the advertisements of Norsk Tipping have had an assumingly tempting and encouraging character with such slogans as “*the possibility to become a Lotto millionaire is never further away than a mouse click*”, and, with regard to the relatively new gaming product “Oddsbomben”, slogans as “*very high prizes in relation to the bets*” and “*very high maximum bets*”.<sup>28</sup> Against that background, the Authority considers it highly unlikely that Norsk Tipping would spend huge sums on advertising if the purpose was not to encourage consumers to participate in lotteries, games of chance and betting.<sup>29</sup>

<sup>27</sup> Reference is made to the Norwegian Government's letter of 16 February 2004.

<sup>28</sup> In an article from Vårt Land 22 July 2004, Hans Olav Fekjær, an expert frequently cited by the Government, gives the following comment about Norsk Tipping's marketing techniques: “*Den aggressive markedsforingen av spillene innholder ikke direkte uriktige opplysninger, men setter et ensidig søkelys på ekstremt sjeldne storvinnere.*”

<sup>29</sup> See the interview with the Managing Director of Norsk Tipping, Mr. Reidar Nordby, published in IGWB, International Gaming and Wagering Business, volume 25, February 2004, according to which: “Nordby noted that turnover has increased every year for the past 20 years, even as the market has flattened somewhat due to competition from Internet bookmakers affecting the lottery's own odds games. He cited strong growth in instant games thanks to a ‘restructuring, better



In its reply to the letter of formal notice the Government reiterates its arguments that the effects of marketing are uncertain and have only an incidental effect on the popularity of each game. Moreover, the Government states that marketing has a “*socio-political aim*” and is essentially aimed at brand building. The Government considers the marketing “*a reasonable aspect of Norwegian gaming policy to increase the visibility of the Norwegian gaming opportunities, at the expense of more aggressive international gaming propositions.*”<sup>30</sup>

In essence, the Norwegian Government argues that Norwegian consumers must be protected against foreign gaming service providers. As a measure to protect the consumers, Norsk Tipping advertises its games in order to make the consumers request Norsk Tipping’s services instead of turning to foreign service providers.

The Authority takes note of the fact that Norsk Tipping, a company wholly owned by the state, uses extensive marketing in order to have Norwegian consumers request its services instead of foreign services, and that the Government considers that aim to be a fulfilment of its own policy. Such an aim appears to be protectionist and there is nothing that suggests that all or most foreign games on offer are more socially harmful than the ones offered by Norsk Tipping. Moreover, regardless of what is the policy behind the marketing, the Government’s statements confirm that Norsk Tipping uses advertising to encourage consumers to participate in its lotteries, games of chance and betting. Whether Norsk Tipping does so only in order to increase its turnover or also to protect Norwegian consumers against foreigners is in this respect immaterial.<sup>31</sup>

Finally, the Authority would recall that advertisement of gaming opportunities can have a more general effect, in the sense that advertisement can also encourage consumers in general to gamble and to use other games than the one being advertised. This issue is especially relevant with regard to those who are afflicted by problem gambling. It is recognised by the Norwegian Government that marketing may increase the risk of problems arising from gambling.<sup>32</sup> Furthermore, if Norsk Tipping’s advertisement has the above-submitted effect of strengthening Norsk Tipping’s brand, the Authority would then assume that the extensive advertising of Norsk Tipping in general also would attract players to the gaming machines operated by Norsk Tipping.

### *c) Expansion of games and gaming opportunities*

Norsk Tipping has introduced a number of new games in recent years. Norsk Tipping has furthermore developed new ways of gambling, including by offering its existing games over the internet, digital TV and by mobile phone (SMS). These new modalities have been accepted by the Norwegian Authorities also after the act introducing the monopoly was enacted.

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marketing, and a more clear positioning of the product line.’” The article is available at <http://www.gemcommunications.com/Publications/currentpubs/igwbabout.htm>.

<sup>30</sup> Reply to the letter of formal notice, page 53.

<sup>31</sup> The following is an extract from the annual report of Norsk Tipping for 2003, see page 19-20. “*Markedsføring og profilering må til for å få folk til å velge Norsk Tippings spill i konkurranse med andre underholdningstilbud. Derfor er Norsk Tipping idag en av landets største annonsører, som er til stede i den norske mediehverdagen gjennom TV, radio, trykte medier og internett.... Visst skal den bidra til at flere velger Norsk Tippings spill i konkurransen med andre tilbud, men ikke for enhver pris.*”

<sup>32</sup> Reply to the letter of formal notice, page 56.

As mentioned in the letter of formal notice, this aspect of Norwegian gaming policy is inconsistent since the approach with regard to expanding Norsk Tipping's games and ways of gaming is very different from the approach to the gaming machines. For instance, on the one hand the Norwegian gaming policy enables potential gaming addicts to sit home and participate in money games such as "Oddsbomben", which have been identified by the Norwegian Government as potentially addictive, using credit cards as a means of payment. In view of the Norwegian Government itself such easy access to gambling from the privacy of one's own home could pave the way for undesirable gambling behaviour.<sup>33</sup> On the other hand, with respect to gaming machines, the Government argues that there is a need to bring gaming into the controlled rooms and to shelter persons with gambling problems from unwillingly coming across such machines.

In the reply to the letter of formal notice the Norwegian Government states that the internet game segment is very small in Norway compared to other countries. The Government also states that the internet games referred to are only trial products which will be evaluated in the course of 2004. Furthermore, that to the extent new games are allowed via modern electronic technology it is in a controlled and regulated approach. The exclusive rights model provides a guarantee that the interests of the gaming company's finances are not the overriding factors in the design of the games and the information provided. On that basis the Government considers that there is a consistent connection between Norsk Tipping's current gaming opportunities and the approach to the further development of these opportunities through new technological channels.

The Authority, however, cannot see that this alters the main conclusion of the letter of formal notice. Despite the Norwegian Government's view that the approach is careful and regulated, it accepts that Norsk Tipping constantly seeks to expand its games and reach new consumers, including by offering existing and new games on the Internet and via other channels. That despite indications that internet gambling can be addictive, especially due to the lack of control which follows from being able to play from home.<sup>34</sup> Norsk Tipping's expansion in this regard is aimed at meeting competition from foreign gaming services. Even if it were correct that Norsk Tipping is less profit orientated than other gaming providers, its goal is ultimately the same, to get existing and new Norwegian consumers to request its services.

*d) High risk – low risk*

It follows from the above discussed points that the Authority considers the Norwegian gaming policy to be inconsistent to such an extent that the Government cannot validly claim that the monopoly for Norsk Tipping is justified as part of a coherent approach to combat gambling addiction. On one hand, the Government wants to limit gaming opportunities to prevent gaming addiction by the introduction of a monopoly for the operation of gaming machines. On the other hand, the Government allows its own provider of gaming services, Norsk Tipping, to market its games extensively and develop new games and ways of gaming in order to attract both existing and new players to its games.

<sup>33</sup> Reference is made to section 3.2.3 in Ot. prp.nr. 44 (2002-2003).

<sup>34</sup> See, to that end, an article published in Aftenposten online on 9 March 2003. According to this article, "Nettspill – farligere enn andre spill", experts claim that a new group of problem gamblers has arisen lately, namely Internet gamblers. The main reasons for Internet gambling appear to be the absence of social control (possibility to play from home) and the possibility to stake large sums using electronic payment means.

To justify this apparent inconsistency in its gaming policy, the Norwegian Government has argued that a distinction should be drawn between so-called “high risk” and “low risk” games. In the view of the Norwegian Government, it is not inconsistent to, at the same time, restrict the freedom to provide some gambling services and actively encourage consumers to participate in other types of games. In this respect, the Government has argued that all Norsk Tipping’s existing games with the possible exception of “Oddsens” should be classified as “low risk” games.

In its reply to the letter of formal notice the Government furthermore argues that the statements about consistency in paragraph 67 of *Gambelli* cannot imply that national authorities cannot advertise the money games and lotteries that are not considered to lead to social problems in terms of crime and gaming addiction, at the same time as restrictions or prohibitions are introduced in respect of games that are considered to have such negative consequences.<sup>35</sup>

As a starting point the Authority recalls that the Court of Justice in paragraph 69 of *Gambelli* held that “[i]n so far as the authorities of a Member State incite and encourage consumers to participate in lotteries, games of chance and betting to the financial benefit of the public purse, the authorities of that State cannot invoke public order concerns relating to the need to reduce opportunities for betting in order to justify measures such as those at issue in the main proceedings.”

At issue in *Gambelli* was the monopoly on sporting bets. The Court nevertheless listed different gaming activities and required a consistent approach with respect to games being restricted and games in which the state encouraged participation. More specifically, the Court required a consistent approach on games as different as “soft” lotteries and “hard” betting. Hence, the approach taken by the Government seems not to comply with the consistency test laid down in the case law.

However, even if the Authority would agree with the Norwegian Government’s reading of *Gambelli* in the sense that it is not necessarily inconsistent to operate with some differences in gaming policies according to whether the gaming services at issue may cause social problems or not, such a distinction must then in any event have a solid factual basis.

In the letter of formal notice the Authority considered it doubtful whether there is such a clear division between “high risk” and “low risk” games, which would justify taking two very opposite approaches in respect of the two categories. At the time no factual information had been submitted to the Authority that pointed to such a simple two layer division in the risk assessment of different kind of games. The Norwegian Government was therefore invited to submit studies which would demonstrate the basis of the distinction, including studies that examined the games offered by Norsk Tipping with regard to the classification.<sup>36</sup>

In its reply to the letter of formal notice, the Norwegian Government states that the distinction is justified on the basis of both historical experience and contemporary studies. To the latter the reply provides some extracts from scholarly articles that differentiate between hard and soft forms of gambling with slot machines falling in the former category. However, Norway has offered no specific studies demonstrating that the games of Norsk Tipping necessarily should be considered soft and do not create addiction. Nor

<sup>35</sup> Reply to the letter of formal notice, page 49.

<sup>36</sup> Letter of formal notice, page 7.

do the studies referred to by Norway maintain that the dividing line between hard and soft gambling is set in stone.<sup>37</sup> For instance it is stated that the distinction between hard and soft games may not necessarily depend on just the game but also the playing conditions and the way the game works. It is interesting to note that one scholar referred to by the Norwegian Government explains (when discussing slot machines) that addiction is an integrated mix of factors and lists quite a few factors external to the person that can have influence.<sup>38</sup> The common denominator among these factors is that they more or less all relate to marketing and machine functionality and could be regulated.

Hence, the Government has provided some studies placing gaming machines among “hard” games. However, the Government has not presented scientific studies confirming that Norsk Tipping’s games necessarily fall into the category “soft” games.

That suggests that the Norwegian Government did not have a strong scientific basis for the distinction between “high risk” and “low risk” games despite the considerably different policies based on that distinction. Despite that lack of scientific basis, the Norwegian Government decided not to first try to enact less restrictive measures, but decided on establishing a monopoly, the most restrictive approach possible as it involves an outright negation of fundamental freedoms. It is also notable that Norsk Tipping has been allowed to continue its increasingly aggressive marketing strategy for years without any studies being conducted neither as to the classification of the games offered by the company nor whether its advertisements for games, which can be termed as soft, have any affect on the demand for harder games and on those who suffer from gambling addiction. Nor has the Government so far imposed any limitations on the marketing activities despite the SIRUS study published in 2003 (see below), which suggests that gaming addicts participate in a number of games including those offered by Norsk Tipping.

In the letter of formal notice, the Norwegian Government was also invited to explain how the studies it relied on when preparing the legislation related to other scientific studies that apparently found that, although a substantial number of gambling addictive persons play on gaming machines, a number of other games might also be addictive and that gambling addicts actually play on a number of different games.

The Authority referred to the country-wide survey of gaming and gambling that was conveyed by the Norwegian institute SIRUS in 2003.<sup>39</sup> The study is the only comprehensive one dealing generally with gambling in Norway and was initiated by the Norwegian Gaming Board. The extent of problem gambling is dealt with in Chapter 4 (at p. 61 et seq.). Table 4.8 shows the prevalence of problem gamblers (including former problem gamblers) among all participants in different games during the last 12 months. It follows from that table that 4,7 % of all participants on gaming machines last year were identified as problem gamblers, compared to 5,1 % on Oddsen,<sup>40</sup> 6,7 % on horse race betting and 9,2 % on Internet games. Table 4.2 shows the percentage of problem gamblers, who have participated in different games either daily or weekly during the last 12 months. According to that table, 78 % of all problem gamblers participated in gaming machine games daily or weekly in the last 12 months, while 67 % participated in Oddsen games, 60 % on football bets and 51 % on lotteries (like Lotto). The complexity of the problem is

<sup>37</sup> See the quotations on page 10 of the reply to the letter of formal notice.

<sup>38</sup> M Griffiths *Gambling Technologies: Prospects for Problem Gambling* Journal of Gambling Studies 15(3) Fall 1999, page 270.

<sup>39</sup> Pengespill og pengespillproblemer i Norge, SIRUS Rapport 2/2003. The Survey is available at <http://www.lotteritilsynet.no/dav/253168CBD8F347519A2D5CCC5D91AE96.doc>

<sup>40</sup> Oddsen is a game, operated by Norsk Tipping, in which the player is supposed to predict the result of football matches.

further illustrated by table 4.9, showing how many different groups of games the problem gamblers participated in during their lives and during the last 12 months. This table shows that 30,6 % of the problem gamblers had participated in 0-3 groups of games during the last year, whereas 47,2 % had participated in 4-6 groups of games during the same period and 22,2 % had participated in 7-9 groups of games during the last 12 months.

In its reply to the letter of formal notice the Government raised doubts about the findings of the SIRUS study by pointing out that the response rate was 55% combined with the fact that addicts tend to decline to participate in such surveys or even provide false information. In the Authority's view that could imply that the share of problem gamblers in the population is higher than what is referred to in the study, but hardly alter the main conclusion that the behavior of problem gamblers is complex and that they tend to play more than one form of games. In any event, the degree of uncertainty caused by the response rate is acknowledged in the research and it might be added that the response rate is far from unusual both in domestic and international terms according to TNS Gallup.<sup>41</sup>

The Norwegian Government cites another study, *Entertainment with an aftertaste (Underholdning med bismak)*, as a more reliable study, referring to the fact that the response rate was 97%. The survey observed that 3,2 % or 11,000 teenagers in Norway showed clear symptoms of gambling problems and gaming machines were the most common form of gambling among these teenagers. According to the study, of the total number of times the teenagers had participated in money games, gaming machines represented 32%.

As far as the Authority understands, although gaming machines is the most common form of gaming among teenagers, the survey also confirms that teenagers participate in a number of other games and that gaming addiction is not exclusively connected to the gaming machines. Hence, the Authority cannot see that this survey is to affect the conclusions of the SIRUS study. Moreover, it only focused on teenagers 13-19 years of age and was therefore much more limited in scope than the SIRUS study. The Authority further notes that in the introduction to the study, it mentions observance of the 18-year age limit as an important measure to combat problem gambling amongst teenagers.

The Government also points to the uncertainty of scientific studies as those referred to above, stressing that research on gaming addiction is a relatively new discipline and that the studies have used different diagnostic methods in identifying gambling addicts. For that reason the Government relies more on statistics from treatment institutions on problem gambling than scientific studies. According to such statistics 90% of those who sought treatment in a given period had problems with gaming machines. Also statistics from the help line for gambling addicts that was set up in April 2003 confirms that addiction to gaming machines is involved in a large majority of the sessions.

Although the Authority does not question the referred statistics, it fails to see how they alter the findings of the SIRUS study. According to that study a high percentage of problem gamblers participated in *inter alia* gaming machine games, Oddsen and football bets daily or weekly in the last 12 months. Hence, the fact that many of those who contact

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<sup>41</sup> Letter from TNS Gallup to Norsk Lotteridrift dated 28 June 2004, enclosed as annex 7 to a letter from Hjort to the Authority dated 6 July 2004, a copy of which was sent to the Norwegian Government.

the help line consider they have problem with gaming machines does not exclude that they have problems with other games as well.<sup>42</sup>

In the letter of formal notice the Authority also referred to the Norwegian Government's own statements according to which *"it seems ... that there is a certain risk of developing gambling addiction by gambling on gaming machines and participating in horse race betting, but also games offered by Oddsen (Odds games) seem to represent an increasing danger of developing problematic gambling"*.<sup>43</sup> This view is further supported in Norsk Tipping's Annual Report for 2002, in which the company concludes:

*"The growth with regard to Oddsen is gratifying, but, at the same time, there are particular challenges linked to that game. Oddsen is the game which attracts the largest number of players outside Norsk Tipping's main target groups, i.e. professional players who put high stakes, and hence, might be at risk for gambling addiction and other undesirable, social side effects"*.<sup>44</sup>

The Authority takes note of the information provided by the Norwegian Government that the maximum stake for such fixed odds games was reduced in the course of 2003, and that Norsk Tipping's revenue because of the deliberate restrictions was reduced from NOK 1,847 million in 2002 to NOK 1,612 million in 2003.<sup>45</sup> Nevertheless, that reduction seems to be just a minor correction taking into account that Norsk Tipping's revenue from Oddsen increased 62% the year before, from NOK 1,138 million in 2001 to 1,847 million in 2002.<sup>46</sup> In the reply to the letter of formal notice the Norwegian Government states that it believes the reduction of stake to be a significant correction and the current system is within the bounds of what is justifiable in terms of Norwegian gaming policy and traditions. Nevertheless, with reference to the above, the Authority cannot see that the changes made have altered the nature of the game. The Authority also draws attention to the fact that Hans Olav Fekjær, an expert frequently cited by the Norwegian Government, considers *"Oddsen"* in its current form to be an addictive game.<sup>47</sup>

In light of the above the Authority cannot accept that the Norwegian Government's assertions that the difference between "high risk" and "low risk" games justifies the apparent inconsistency of the Norwegian gaming policy. On the basis of this rather unclear distinction the Government maintains two markedly different policies.

In any event, the Norwegian legislation has allowed Norsk Tipping to operate games such as Oddsen which it concedes to being a "high risk" game. Furthermore, although not operated by Norsk Tipping, other "high risk" games have been allowed such as horse-betting (Rikstoto) and the internet game [www.tivoli.no](http://www.tivoli.no). Horse-betting is considered a "high risk" game by the Government. Nevertheless, the Authority has observed that Rikstoto is allowed to extensively market its games and furthermore offer its games on the internet. As regards Tivoli.no, the games on the website include casino like games, e.g. "blackjack". Furthermore people are induced to playing by the offer of prices as high as 100.000 NOK. The Authority considers this as yet another example of the inconsistency of the Norwegian gaming policy.

<sup>42</sup> The Authority moreover notes that stickers with the telephone number to the help line have been placed on all gaming machines. More than half of the callers referred to the stickers as the source of information about the help line, see the annual report of the Gaming Board for 2003.

<sup>43</sup> Ot.prp. nr. 44 (2002-2003), section 5.4.

<sup>44</sup> The Annual Report, page 23 (the Authority's unofficial translation).

<sup>45</sup> See the Norwegian Government's letter to the Authority of 16 February 2004.

<sup>46</sup> Norsk Tipping's annual report for 2002.

<sup>47</sup> See article in Vårt Land 22 July 2002.

*e) Norsk Tipping's aim to increase the number of gaming machine players*

The third inconsistency in the Norwegian policy relates to the explicitly stated aim of Norsk Tipping to double the number of gaming machines players from 500.000 to 1 million. That aim has been confirmed by the Managing Director in Norsk Tipping in early spring 2004.<sup>48</sup> Furthermore, in Norsk Tipping's "*Overordnet løsningskonsept for Norsk Tippings automatvirksomhet*" from 3 May 2003 the following is stated:

*"We must quickly raise the turnover in all machines in order to fulfill our economic plans/budgets, based on the current ca. 500.000 gaming machine punters. The current machine punters will be the main target group for Norsk Tipping's gaming machine business in 2004-2005.*

*We must recruit new punters and increase the number of punters. Within three years, our goal is to at least double the number of punters on gaming machines. The reason is that we want a larger group of punters who bet for a lower amount each compared to the current situation".<sup>49</sup>*

Moreover, in Norsk Tipping's Annual report for the year 2003, published in March 2004, the director of the subsidiary responsible for gaming machines claims that it is the company's objective to increase the number of players.<sup>50</sup>

In the reply to the letter of formal notice the Norwegian Government denies that it is a goal to increase the number of players and it refers to statements made by the State Secretary in the Ministry Church and Culture in a radio debate on 16 May 2003. It moreover emphasizes that although Norsk Tipping maintains its autonomy and takes independent decisions on day-to-day operations, in case of a disagreement between the Ministry and Norsk Tipping there shall be no doubt that the Ministry's view on how gaming policy objectives will be carried out will prevail.<sup>51</sup>

In the Authority's opinion this statement only makes it more intriguing that Norsk Tipping several times after the just mentioned radio debate has continued to state that its aim is to double the number of players.

The Government argues in the reply to the letter of formal notice that Norsk Tipping's statements on the matter are not supported in the documentation and the decisions on which the new machines are based.<sup>52</sup> In the Authority's view that is to turn the issue upside down. The question should rather be how the Ministry, apart from giving statements in radio debates, has exercised its control over the company to make sure that it has changed what appears to be a fundamental basis for Norsk Tipping's operation of the gaming machines. In the same vein, the Authority is not aware that the Government

<sup>48</sup> See e.g. the interview with the Managing Director of Norsk Tipping Mr. Reidar Nordby in Kapital 1/2004.

<sup>49</sup> The Authority's unofficial translation. In Norwegian the text is as follows: "*Vi må raskt få opp omsetningen på den enkelte automat for å oppfylle våre økonomiske planer/budsjetter med basis i dagens ca. 500.000 automatspillere. Dagens automatspillere vil utgjøre hovedmålgruppen for Norsk Tippings automatvirksomhet i årene 2004-2005. Vi skal rekruttere nye spillere og øke spillergrunnlaget. Innen tre år er vårt mål å minimum doble spillergrunnlaget for gevinstautomatspill. Bakgrunnen for dette er at vi ønsker flere spillere som hver spiller for mindre beløp enn i dag.*"

<sup>50</sup> Annual report of Norsk Tipping for 2003, page 15.

<sup>51</sup> Reply to the letter of formal notice, page 52.

<sup>52</sup> Reply to the letter of formal notice, page 49.

directly has interfered with Norsk Tipping’s ordering of machines and software, including the shaping of the whole gaming machine concept and the budgetary work of Norsk Tipping in order to hinder the exercise of a significantly more aggressive policy than that described by the Government. Unless there have been such direct involvement from the Government, the Authority would assume that not just the new machines, but the shaping by Norsk Tipping of the whole new gaming concept is tailored to attract new players to gaming machines.<sup>53</sup>

### III.4 Proportionality of the Norwegian legislation

#### *a) General introduction*

The Norwegian Government has acknowledged that the the introduction of a monopoly constitutes a restriction on the freedom of establishment and the freedom to provide services within the meaning of Articles 31 and 36 EEA. It also accepts that this entails that the exclusive rights may not go beyond what is necessary in order to meet the requirement of proportionality. Similarly, it does not dispute that it is required to demonstrate which concerns are behind the restriction. The Government, however, argues that it should be accorded a wide scope of discretion in its choice of measures for achieving the objectives that lies behind the introduction of the monopoly.<sup>54</sup>

The Authority concurs that the case law of the Court of Justice gives the Member States a certain, although not unlimited, margin of appreciation in the field of gaming activities. In *Gambelli*, the Court of Justice made reference to its earlier case law and stated that “*the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation sufficient to enable them to determine what consumer protection and the preservation of public order require.*”<sup>55</sup> Thus, the level of protection against gambling addiction that a State wishes to ensure is first and foremost a political question for each State. The fact that other States might have chosen a different model of protection does not imply that the measure is disproportionate.<sup>56</sup>

However, the leeway given to EEA States with regard to the level of protection against gambling addiction does not mean that the supervisory bodies are unable to verify that the State concerned first decided to take the restrictive measure after having performed an analysis of the genuine need to restrict the free movement of services and the right of free establishment.<sup>57</sup>

Nor does it mean that the supervisory bodies should refrain from reviewing that the measure is not only motivated by legitimate concerns but also *objectively* suitable and appropriate.<sup>58</sup> In *Gambelli* the Court of Justice stated that the discretion accorded to the Member States in the field of gambling activities still had to be exercised within the classical justification test pertaining to restrictions on freedom of establishment and

<sup>53</sup> Here the Authority has also taken note of that Norsk Tipping in the above mentioned presentation explains that it will over time attract new players by “*branding, kanalvalg og tilpasset spilletilbud*”.

<sup>54</sup> Reply to the letter of formal notice, page 25-27.

<sup>55</sup> Case C-243/01 *Gambelli*, cited above, at paragraph 63.

<sup>56</sup> Case C-124/97 *Läärä*, cited above, at paragraph 35-37 and Case C-67/98 *Zenatti*, cited above, at paragraph 33-35.

<sup>57</sup> See similar with regard to Article 11 of the Agreement Case E-3/00, *EFTA Surveillance Authority v. Kingdom of Norway* [2000-2001] EFTA Court Report, p. 73, at paragraph 42.

<sup>58</sup> Case C-243/01 *Gambelli*, mentioned above, at paragraph 67.



freedom to provide services.<sup>59</sup> The Court continued that it was therefore up to the scrutinizing court – and not just the State itself – to assess whether the measure is “*necessary in order to attain*” the aim behind it and that this would not be the case if the means went “*beyond what is necessary*”.<sup>60</sup> In this respect, the judgment in *Gambelli* merely reiterates what was earlier said in *Zenatti*, namely that it is for the competent “*court to verify whether ... the restrictions which [the national legislation] imposes do not appear disproportionate in the light of these objectives*”.<sup>61</sup>

The Court of Justice took the same approach in *Lindman*. In that case the Norwegian Government argued that a restriction on foreign gambling activities was justified by “*the need to combat the damaging consequences of gambling addiction, which is a matter of public health. Thus, there are rehabilitation centres and other infrastructure for treating gamblers; gambling creates social problems, such as depriving of resources the families of gambling addicts, divorce, and suicide*”. The Court of Justice did not accept that it was sufficient that the Government invoked those laudable aims and held that the “*the reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness of the restrictive measure adopted by that State*”.<sup>62</sup> Moreover, after having carried out this analysis, the Court showed no hesitation in finding that the measure was, in fact, disproportionate and hence contrary to Article 49 of the EC Treaty.

The present case distinguishes itself from the earlier cases before the Court of Justice (and resembles the *Gambelli*-judgment) by concerning not the maintenance, but the introduction of a monopoly. In the opinion of the Norwegian Government, the assessment of the necessity of a monopoly should be the same regardless of whether the question arises in the context of an existing monopoly or in relation to the introduction of a monopoly.<sup>63</sup> As a matter of law the Authority agrees that the substantive test might by and large coincide in these two situations, although it can hardly be denied that an act prohibiting hitherto existing activities hits existing operators in a very intense way whereas a continuation of an existing monopoly does not interfere with existing economic activities. However, on a factual basis the two situations are quite different. In relation to an existing monopoly, the supervisory organs have no other choice than merely assessing the measure in the abstract since they have no information about how the situation would be in a liberalised system. In contrast, in cases where a monopoly is introduced the supervisory organs have an altogether different possibility to perform a genuine and specific assessment of the actual necessity of the particular monopoly. Similarly, the latter situation provides a better basis for verifying the consistency of the national gaming policy.

A different question is whether it falls upon the Authority or the Government to prove whether the measure in question actually is suitable and necessary in order to secure the level of protection that the Norwegian Government wishes to obtain in relation to gambling addiction. In its answer to the letter of formal notice the Norwegian Government

<sup>59</sup> Case C-243/01 *Gambelli*, mentioned above, at paragraph 64.

<sup>60</sup> Case C-243/01 *Gambelli*, mentioned above, at paragraphs 65, 72, 74 and 75. Reference is also made to the opinion of Advocate General Alber, at paragraphs 61 and 115: “*Selv om Domstolen ud fra en abstrakt betragtning har vurderet visse begrænsninger i de grundlæggende friheder som forenelige med fællesskabsretten, betyder det ikke, at en stramning af bestemmelserne, hvis den er i strid med ånden i de grundlæggende frihedsprincipper, på nogen måde kan retfærdiggøres. ... Det er derfor helt i Domstolens ånd at underkaste de forfulgte mål og de hertil anvendte midler en nærmere undersøgelse, selv om Domstolen indtil nu overladt denne opgave til de nationale retsinstanser*”.

<sup>61</sup> Case C-67/98 *Zenatti*, mentioned above, at paragraph 37.

<sup>62</sup> Case C-42/02 *Diana Elisabeth Lindman*, not yet reported, at paragraphs 24-25.

<sup>63</sup> Reply to the letter of formal notice, page 24.

seems to suggest that the burden of proof in this regard lies on the Authority.<sup>64</sup> However, it is the case law of both the EFTA Court and the Court of Justice that the burden of proof is only on the Authority (respectively the Commission) as far as the existence of a restriction is concerned. Where a restriction has been established, it is then for the Government concerned to show that the measure is both suitable and necessary to obtain the aims that motivated it.<sup>65</sup>

b) *The introduction of a monopoly*

According to the Government, the reasons for assigning exclusive rights to Norsk Tipping for the operation of gaming machines is the intention to combat gambling addiction and crime more effectively, to achieve greater control over irregularities in the gaming sector, and to be able to enforce the minimum 18-year age limit more stringently.

In order to secure the above mentioned aims, the Government has introduced the monopoly for Norsk Tipping. It argues that such a model will be necessary to obtain the aims because the monopoly model provides for a restrictive gaming policy and better control of the market. That is for instance explained in its letter from 1 September 2003: *“In order to prevent gambling addiction and under-age gambling, the Ministry considers it necessary to improve the control of the machine software and reduce the number of machines as well as achieve more stringent regulations regarding machine location. Within the new regulatory scheme, machine software can be changed overnight and adjusted upon receiving updated knowledge on the reasons for gaming machine addiction and problem gambling.”*

In the letter of formal notice, the Authority discussed the different measures enacted by the Government in order to carry out its new gaming policy and questioned why a monopoly would be necessary thereto. To the Authority it was of essential significance that the measures introduced by the Government to control the market also seemed possible to introduce within the boundaries of a licence system.

The Authority has never disputed the concrete measures taken to prevent gaming addiction consisting of a reduction of the number of machines, the introduction of new rules on machine software and new rules concerning machine placement. These steps seem to be suitable means of combating gambling addiction. Moreover, the appropriateness of these means seem to be more related to the level of protection that the Norwegian State wishes to attain and therefore falls, according to the case law mentioned above, under the discretion of the Norwegian Authorities. However, the Authority still cannot see why ownership for Norsk Tipping should be necessary in order to obtain these aims. Indeed, the Government itself seems partly to acknowledge that similar restrictions could have been introduced in a license system.<sup>66</sup>

As regards the more vaguely described advantage of regulating the gaming machine market through ownership control, the Authority rejected in its letter of formal notice the arguments that the Government had brought forward in this respect. In the following the Authority will assess the question anew in light of the new argumentation in the

<sup>64</sup> Reply to the letter of formal notice, page 15-16.

<sup>65</sup> Case E-1/03, *EFTA Surveillance Authority v. Iceland* [2003] EFTA Court Report, p. 143 at paragraphs 34-35.

<sup>66</sup> Reference is made to point IV.1.2 of the Norwegian Governments letter to the Authority of 1 September 2003: *“There is reason to believe that basically all kinds of regulations concerning the location of gaming machines could be implemented within both a competition/concession market and a state owned monopoly.”*

Government's reply to the letter of formal notice, cf. point III.4.c-e below. Finally, in points III.4.f-g the Authority will discuss whether a monopoly is necessary in order to enforce the 18-year age limit and prevent crime.

*c) Regulations of a traditional public law nature do not suffice since operators either break them or find loopholes in the regulations*

One of the main reasons advanced by the Norwegian Government as a justification for the monopoly is that a traditional regulation of public law nature by means of legislation cannot, in the Government's view, effectively steer the private operators. In this respect, the Norwegian Government points to the following factors.

First, the Government argues that private operators are adept in finding loopholes in the regulatory framework and use creative interpretations in relation to the specifications on machine functionality: *"In spite of more detailed regulation on type approval and improved supervision of the functionality of gaming machines, the machines have become steadily more aggressive and casino-like".*<sup>67</sup> The Government states that this – from a social perspective – highly problematic trend in the gaming machine market was the main reason why the Parliament decided to opt for an exclusive rights model. It furthermore argues that past experience in Norway *"indicate[s] that continuous updates to technical requirements in a competition or profit-based licensing model would normally result in the regulatory authorities consistently lagging behind in relation to the risk of gaming addiction. ... This suggests that the failed attempts in recent years to impose restrictions on the Norwegian gaming machine market are not due to inefficiency on the part of the Norwegian authorities".*<sup>68</sup>

Moreover, the Government states that private operators have been bending and breaching the regulations. However, these irregularities are hard to define and detect. In Norway's opinion it is in practice not possible to comprehensively supervise and enforce the current licence-based system.

The Authority does not share the Government's view that the said reasons can justify the monopoly. As stated in the Authority's letter of formal notice, to the extent economic operators find loopholes in the current legislation, and thereby legally exploit an unfortunately drafted law or administrative act, the cure is to address the problem by redrafting the legislation and not by introducing a monopoly. Moreover, the Authority fails to see the factual basis for the Government's claim that it has in vain tried to introduce more detailed regulation and restrictions on the market. To the Authority's knowledge, no new rules have been proposed to that effect in the last few years. It is thus difficult to follow Norway's claim that it unsuccessfully has tried to close loopholes in existing legislation and that new rules could not have remedied the problems that the Government now sees in the current market.

Indeed, if one analyses the changes that were actually made to the rules concerning machine functionality one gets the impression that the market has responded to the – few – amendments made by the Government. In 1998 regulatory amendments were adopted which imposed more stringent requirements as regards machine functionality. Figures presented to the Authority concerning the effect of these amendments seem to indicate that turnover decreased significantly as a result of these changes. A confirmation of these indications can be found in the preparatory works to the changes that were made in 2000

<sup>67</sup> Reply to the letter of formal notice, page 39 and see similarly the letter of the Norwegian Government dated 22 September 2004, page 3.

<sup>68</sup> Reply to the letter of formal notice, page 39-40.

where the Government introduced more *liberal* regulations. The changes allowed for 10 times higher prizes, i.e. from NOK 200 to NOK 2000, and halved the minimum sequence time (i.e. the time between intervals in play) from 3 to 1,5 seconds. When outlining the reasons for the changes, the Norwegian Government remarked that they were introduced in order to: “*to maintain the turnover in the gaming machine market and avoid economic losses for the charities*”.<sup>69</sup>

In the same preparatory works it was, moreover, explicitly stated that the aim of the new and milder rules was to stimulate competition with regard to the development of new plays (“*spillekonsepter*”). The turnover in the gaming machines market has since increased significantly. According to the Norwegian Government, the turnover from gaming machines was approximately NOK 22 billion in 2003 whereas it was NOK 8,5 billion in 2001.<sup>70</sup>

On that basis, the Authority must express its surprise that the Norwegian Government in its reply to the letter of formal notice states that a fierce competition with focus on development of new games is an intrinsic consequence of a liberalized market that the Government has steadily tried to counteract.

No information has been provided that can alter the preliminary conclusion of the Authority that it is to a large extent the Government’s own behaviour that has led the market to where it is today. In response to the Authority’s remarks in the letter of formal notice the Norwegian Government has argued that “*when the new requirements for type approval of 1st October 2000 ... did not succeed, it was not because it allowed 10 times higher prizes, from NOK 200 to NOK 2000. The crucial problem with both current and former regulations on prizes is that respectively irregular serial winnings and bonus prizes have been bending the regulation so that the de facto top prizes have reached up to NOK 10 000 and more in the scope of both sets of type approval requirements*”.<sup>71</sup> To that the Authority remarks that it would have been a more logical step to take to amend the regulation than to introduce the monopoly. However, to the Authority’s knowledge no such amendments have been made, including in the June 2002 proposal. It therefore remains the view of the Authority that the described problems stems from the Governments own enactment of rules allowing considerably more aggressive machines.

Concerning the Norwegian Government’s argument that the private operators are violating the current rules, the Authority refers to the Governments own letter of 1 September 2003 in which the Government admits that the Gaming Board’s control and inspections of machines have only found few breaches of the legislation with regard to machine functionality after type approval and continues: “*In Norway the problem is not the presence of unlicensed software. The problem is, however, the presence of aggressive machines in locations that are not considered as natural gaming environments with regard to social consideration*”.<sup>72</sup>

*d) The need for a swift change in gaming regulation in order to counteract negative trends*

The Norwegian Government has repeatedly claimed that the monopoly model is necessary in order to allow for a swift change in regulations concerning the functionality of gaming machines. Such a swift response is in the Government’s view necessary in order to act

<sup>69</sup> Reference is made to the Norwegian Government’s letter to the Authority of 24 February 2003, page 2.

<sup>70</sup> Reply to the letter of formal notice, page 34.

<sup>71</sup> Reply to the letter of formal notice, page 40.

<sup>72</sup> Section IV.3 of the Government’s letter of 1 September 2003.

without delay in response to any new information about gambling addiction. In support of that view, the Government brings forward two arguments:

First, private operators have been lobbying against the Government's attempts to introduce stricter standards. They have, *inter alia*, been "*calling for further studies and more documentation before any significant amendments in their view could be justifiably made to the regulations*".<sup>73</sup> In this respect, the Government refers to the "*extensive lobbying and numerous legal proceedings which the Government, the Storting and the Authority have sustained in connection with the attempts to impose more stringent restrictions on the existing gaming machine market in the past five years*".<sup>74</sup>

This leads the Government to conclude that "*the difference between a state-controlled exclusive rights operator and a licence-based market is therefore that new, preventive regulations are consistently implemented later in a license-based market*".<sup>75</sup> In the Government's opinion one might even question whether it is possible at all to introduce more stringent rules in a license-system. This is so since "*private financial interests in relation to any tightening of the rules on game design, monitoring and enforcement [have] a stronger incentive for lobbying for the best possible financial operating conditions than a non-profit owned state-owned gaming enterprise. ... The result is, in fact, that the interests of those citizens who have a special need for protection against problem gambling suffer in favour of the interests of private market forces (Commercial interest prevails)*".<sup>76</sup>

Second, the Government states that private operators have hitherto taken several legal actions against new rules introducing more stringent regulations. In the Government's view such legal proceedings are unfortunate as they imply that the amendments cannot focus exclusively on the social policy issues. In contrast, with a monopoly solution there will be fewer attempts to seek legal redress: "*By eliminating private operators from high-risk gaming opportunities, one may also remove the financial basis for making the question of amendment to regulations, as the Government has experienced several times, a judicial issue*".<sup>77</sup>

In the Authority's opinion none of these justification grounds can be accepted. First, as stated above under point III.2, the Government neither needs agreement from the private parties in order to introduce more stringent rules nor any appreciation on their part that the suggested rules would be more beneficial than the existing ones. Moreover, as long as they act in a consistent manner, EEA law does not prohibit EEA States from introducing stricter rules in spite of doubts as to their scientific foundation. That the affected operators might suggest the responsible state body not to amend the rules before new proof is brought forward, can never impede the state from exercising its legislative powers and introduce the rules it sees fit.

<sup>73</sup> Reply to the letter of formal notice, page 32 and see similarly page 41 in which it is stated that as a justification for the monopoly that "*in a licence-based market, such regulatory interventions are usually met with resistance and demands for scientific evidence*".

<sup>74</sup> Reply to the letter of formal notice, page 43.

<sup>75</sup> Reply to the letter of formal notice, page 41.

<sup>76</sup> Reply to the letter of formal notice, pages 42-43. A related argument was put forward in the preparatory works to the bill that later was enacted as the act contested in the present case. There, however, the Government also stated that "*non-profit organisations feel obliged to instigate counter measures and work proactively to influence the decision-making process if the organisation's funding source appears threatened as a result of more stringent gaming legislation*".

<sup>77</sup> Reply to the letter of formal notice, page 43.

Second, the Authority cannot accept the argument for the introduction of a monopoly that the affected private operators seek to influence the decision-making. It might factually be correct that private operators and/or charities have political influence. However, even if the Government could only achieve its gaming policy by side-stepping the democratic process, the desire to avoid public discussion and political pressure cannot be seen as a legitimate aim. As stated in the Authority's letter of formal notice this is so even if that aim is construed as a means to react swiftly in order to combat gambling addiction. If, as a result of the political process, legislation is enacted which does not give prevention of gambling addiction the highest priority, the outcome would merely indicate that other issues enjoy a stronger political following. Similarly, if the Parliament agrees with the economic operators that more scientific studies should be presented before the rules are changed, then it can hardly be considered an appropriate reaction to introduce a system that for that very same reason makes it unnecessary to involve the Parliament.

Nor can the advanced need for swift regulatory changes justify the monopoly solution. Even disregarding whether there is a factual need to take decisions within a very short time frame, the normal rules in Norwegian law ensure that swift decisions can be taken. As stated in the Authority's letter of formal notice, the Norwegian legal order allows for the possibility of delegation of regulatory powers to the relevant ministry. A public hearing can normally be carried out within 6 weeks and even faster if it is objectively necessary. The legislation could even include an authorisation to dispense with a hearing if the responsible authorities considered the danger to be particularly acute. Indeed, this has not been disputed by the Government who only seems to argue that this avenue might not be *politically* open due to lobbying from the affected operators and the charities.

Third, the Authority fails to see that in the EEA legal order – which builds on fundamental rights including the right to judicial review<sup>78</sup> - it should be a valid justification for a monopoly that a government wishes to avoid legal proceedings concerning the validity of new rules enacted by the Government or the Parliament. It might be that it would be more convenient if a government, in the elaboration of new rules, can focus exclusively on social policy issues and not take into consideration the risk that those rules might be challenged before the courts. However, in a legal system that both nationally and by way of international commitments is built on the rule of law such an objective cannot serve as a reason for limiting fundamental freedoms under EEA law.

Finally, the Authority cannot help to be a bit puzzled about the Government's assertions that it has made several attempts to impose more stringent restrictions on the existing gaming machine market in the past five years. As already stated, to the Authority's knowledge neither a bill nor a regulation has been put forward by the Government in the period between the introduction of the present regulation from autumn 2000 and the two proposals from June and October 2002. Moreover, the 2000-regulation introduced a *less* stringent system than the one previously in place.

#### *e) Expeditious enforcement*

In view of the Norwegian Government, the monopoly model is also necessary because the present license system does not allow for expeditious enforcement and thereby for a swift protection of the gamblers against illegally aggressive machines: *“As regards enforcement, the fact is that when a breach of a licence has been detected in a licence-based model, this does not necessarily mean that the offender can be required to remedy the breach immediately, which is the case in a state-controlled exclusive rights model. As*

<sup>78</sup>

See most notably Case E-2/03 *Asgeirsson* [2003] EFTA Court Report, p. 185, at paragraph 23.

*opposed to what the Authority seems to believe on page 12 and 13 [of the letter of formal notice], the ordinary mechanisms of public law cannot be summarily dispensed with in a rights-based licensing model in the same way as when the Government holds the rights for itself, as a private licensee if free to dispute any governmental action according to a license through the court system”.*<sup>79</sup>

The Authority fails to see the particular difficulties advanced by the Norwegian Government. Moreover, it in any event disputes that such delays in the enforcement could justify the dramatic step of introducing a monopoly. As stated in the Authority’s letter of formal notice, according to Norwegian administrative law, the general rule is that neither an administrative complaint nor instigation of judicial proceedings has suspensive effect. Therefore a decision to revoke an operator’s licence for infringing gaming regulations would normally have immediate effect. Moreover, nothing would prevent the Government from inserting an explicit provision to that effect in the legislation regulating gambling services. New licenses could be issued under the express condition that an operator undertakes to follow the instruction of the Gaming Board until that instruction might have been quashed by a higher body of law.

*f) Enforcement of the 18-year age limit*

As mentioned above, the original proposal of the Norwegian Government contained stricter provisions on location of gaming machines, which at the time was considered necessary to enforce the 18-year age limit effectively. The proposal stated: *“The Ministry maintains that the current system of installing money gaming machines in shops, service stations and shopping arcades exposes minors and persons with problematic gaming behaviour to money gaming... The Ministry therefore calls for the installation of such gaming machines to be confined to designated premises to which minors are denied access.”* That proposal was withdrawn after mass opposition.<sup>80</sup>

The Norwegian Government has later argued that the monopoly model as such, with less aggressive machines and better control through price vouchers, will enable Norsk Tipping to place gaming machines in areas accessible to minors such as gas stations, kiosks, public waiting rooms etc without damaging the effectiveness of the enforcement of the 18-year age limit. In view of the Ministry, *“the benefits from the monopoly model itself make it possible to allow machines into locations without absolute access control”.*<sup>81</sup>

The Authority fails to see how other possible benefits from the model are linked to the question of how to prevent under-age gambling. Even if the new machines are fewer and less aggressive that does not hinder minors from accessing the machines. This confirms that the monopoly cannot be regarded as an effective means to secure enforcement of the age limit. As outlined in the letter of formal notice, under the monopoly system the enforcement of the age limit will still depend on the firmness of the control exercised by the location owner and thus not be under the direct control of the monopoly holder. Furthermore, the location owner will also in the new model have an economic incentive to let as many players as possible use the machines as his commission is proportionate to the earnings on the machine. Finally, a system whereby winnings are paid in vouchers instead of cash to secure compliance with the age limit is not in any way connected to the introduction of a monopoly and could have been introduced under a licence system.

<sup>79</sup> Reply to the letter of formal notice, page 41.

<sup>80</sup> See III.2 above.

<sup>81</sup> See point IV.1.3 of the Norwegian Government’s letter to the Authority of 1 September 2003. See also the reply to the letter of formal notice page 34-35.

*g) Combat of crime*

In its reply to the letter of formal notice the Government states that various types of crimes are linked to the current gaming machines. In addition to thefts where the statistics illustrate alarming figures, the Government mentions crimes like embezzlement/fraud, bribes from licensee/operator as well as money laundering. These types of crimes are either known, or supposed to be an unwanted but significant part of the current market.

As regards burglary/theft, fraud and money laundering the Norwegian Government maintains that introducing vouchers and making the location owners responsible for losses incurred by these crimes can lead to a reduction. The Authority does not dispute that these measures can potentially lead to a reduction in crimes and, moreover, agrees that the envisaged “network solution” does not seem in itself to raise problems in relation to EEA law. This measure seems to make it possible to establish a frame within which the machines can operate and thereby provide for control of the content of the games (including e.g. their speed and the average and maximum price) and reduce the risk of money laundering etc. However, the Authority cannot see the causal link between the potential crime reduction and the monopoly. As recognised by the Government in its letter to the Authority of 1 September 2003, these measures could just as well have been enacted in a licence system.

The Government has not submitted documentation that shows that crimes related to gaming machines is a serious problem in Norway. However, it claims that in several cases bribes have been offered to location owners to secure the most attractive sites. No documents have been submitted to substantiate these assertions and only one case was mentioned explicitly. In any event, it seems that less restrictive measures than banning private operators from operating slot machines are available to effectively combat this problem, e.g. revoke the licences for those who engage in such and other illegal activities.

The Government furthermore argues that gaming addicts with financial problems in many cases will try to resolve them through criminal acts. Hence, reducing addiction will also reduce crime. The Authority considers the link made between crime and gaming addiction to be unclear. Moreover, as stated above, the Authority considers the measures to prevent gaming addiction possible also to carry out in a licence system. Thus, the Authority fails to see the relevance of a link between reduction of crime in general and the introduction of a monopoly.

Finally, the Government points to the 2003 annual report of the Gaming Board, which states that 1.243 rectification orders were issued for contraventions of the regulations regarding authorisation to install gaming machines. The Norwegian Government considers this to be a considerable increase in relation to the corresponding figures for 2002. The reply contains no further information about what these rectification orders concerned. According to information available to the Authority, roughly 1100 of the rectification orders were issued due to lack of proper *labels* showing that the machine had been approved by the Gaming Board. To the extent the rectification orders concern violations of provisions without penal sanctions being imposed, it is the view of the Authority that they are irrelevant for the illustration of crime related to gaming machines. The annual report from 2003 contains no information about how many cases that were reported to the police as concerning violations of criminal law provisions, but it is stated that 56 machines were shut down or confiscated by the police due to lack of licence or type approval. That is a decrease from 2002 when 96 machines were required confiscated.<sup>82</sup>

<sup>82</sup>

Annual Report from the Gaming Board 2002 page 18.



Therefore it remains the view of the Authority that the prevention of crime does not necessitate the introduction of a monopoly.

### III.5 Conclusion

In light of the considerations above, the Authority concludes that that the amendment to the Norwegian gaming and lottery legislation in “*lov 2003-08-29 om endringer i pengespill- og lotterilovgivningen*”, which introduces a monopoly with regard to the operation of gaming machines, is contrary to the free provision of services in Article 36 of the EEA Agreement and to the freedom of establishment in Article 31 of the EEA Agreement.

According to the Authority’s information, the majority of the existing licences expire at the end of 2004. Moreover, Norsk Tipping is entering the market and will increase its activities in the coming months. Therefore, due to the urgency of the matter, the Norwegian Government is given one month to comply with this reasoned opinion.

FOR THE ABOVE REASONS,

THE EFTA SURVEILLANCE AUTHORITY,

pursuant to the first paragraph of Article 31 of the Surveillance and Court Agreement and after having given the Norwegian Government the opportunity of submitting its observations,

DECLARES AS ITS REASONED OPINION

that Norway, by amending the Norwegian gaming and lottery legislation in “*lov 2003-08-29 om endringer i pengespill- og lotterilovgivningen*”, which introduces a monopoly with regard to the operation of gaming machines, has infringed Articles 31 and 36 of the EEA Agreement.

Pursuant to the second paragraph of Article 31 of the Surveillance and Court Agreement, the EFTA Surveillance Authority requires the Government of Norway to take the necessary measures to comply with this reasoned opinion within *one month* following notification thereof.

Done at Brussels, 20 October 2004.

For the EFTA Surveillance Authority

Bernd Hammermann  
College Member

Niels Fenger  
Director